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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CAMILLA A. TOFT, Plaintiff, vs. FENTON & MCGARVEY LAW FIRM, P.S.C. and JOHN DOES 1 to 10, Defendants.	Civil Action No. **COMPLAINT**

Plaintiff, Camilla A. Toft, , by way of Complaint against Defendant, Fenton & McGarvey Law Firm, P.S.C., (and John does 1 to 10) states:

I. NATURE OF THE ACTION

1. Plaintiff brings this action alleging that Defendant violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*. ("FDCPA") by making statements that misrepresented the tax consequences of a reduced settlement. Such statement "does not accurately reflect the relevant law; in this respect, it is not true. In addition, the statement's invocation of the IRS is deceptive and misleading."[1]

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[1] *Good v. Nationwide Credit, Inc.*, 55 F. Supp. 3d 742, 749-50 (E.D. Pa. 2014); *see also Balon v. Enhanced Recovery Co.*, No. 3:16-CV-0410, 2016 U.S. Dist. LEXIS 72142, at *19-20 (M.D. Pa. June 2, 2016) ("the challenged language could, without bizarre or idiosyncratic interpretation, influence the least sophisticated debtor's decision-making process. As a result, it is determined that the challenged language is material." (internal quotations marks and citation omitted)); *Velez*
(continued)

II. JURISDICTION AND VENUE

2. This Court has jurisdiction to entertain this matter pursuant to 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.

3. Venue in this action properly lies in the District Court of New Jersey, Trenton Vicinage.

III. PARTIES

4. Plaintiff, Camilla A. Toft ("Plaintiff" or "Toft"), is a natural person residing in Ocean County, New Jersey.

5. Defendant, Fenton & McGarvey Law Firm, P.S.C. ("Defendant" or "F&M"), is a Kentucky corporation with an office located at 2401 Stanley Gault Parkway, Louisville, Kentucky 40223.

6. Defendants John Does 1 to 10 are fictitious names of individuals and businesses alleged for the purpose of substituting names of defendants whose identity will be disclosed in discovery and should be made parties to this action.

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v. Enhanced Recovery Co., LLC, No. 16-164, 2016 U.S. Dist. LEXIS 57832, at *10 (E.D. Pa. May 2, 2016) ("There are myriad other ways that the Statement could, without bizarre or idiosyncratic interpretation, influence the least sophisticated debtor's decision-making process."); *Foster v. AllianceOne Receivables Mgmt.*, No. 15-cv-11108, 2016 U.S. Dist. LEXIS 56958, at *5-6 (N.D. Ill. Apr. 28, 2016) ("It is plausible that mention of the IRS in a situation where there is no set of circumstances in which the IRS would be involved could mislead 'a person of modest education and limited commercial savvy.'"); *Pape v. Law Offices of Frank N. Peluso, P.C.*, No. 3:13 CV 63 (JGM), 2016 U.S. Dist. LEXIS 694, at *27-8 (D. Conn. Jan. 5, 2016) (Statement that "[w]e may also report this to the IRS as Debt Cancellation Income pursuant to IRS Reg. § 1.61-12 if payment is not received" violates the FDCPA where "defendant . . . could not report the cancellation of plaintiff's debt to the IRS[.]"); *Wagner v. Client Services, Inc.*, Case No. 08-5546, 2009 U.S. Dist. LEXIS 26604, at *12, 2009 WL 839073 (E.D. Pa., March 26, 2009) ("By failing to attribute the nature of the debt that may be discharged to principal and non-principal amounts, Defendant has not shown that its letter is literally true."); *Kuehn v. Cadle Co.*, Case No. 5:04-cv-432, 2007 U.S. Dist. LEXIS 25764, 2007 WL 1064306 (M.D. Fla., April 6, 2007) (This includes a statement that a 1099 must be issued when a 1099 is not required.).

IV. FACTS

A. Background

7. Defendant is not in the business of extending credit, selling goods or services to consumers.

8. Defendant regularly collects or attempts to collect debts allegedly owed to others which were incurred primarily for personal, family or household purposes.

9. Defendant is in the business of collecting debts or alleged debts of natural persons owed to another which arise from transactions which are primarily for personal, family, or household purposes.

10. Defendant uses the mails, telephone, the internet and other instruments of interstate commerce in engaging in the business of collecting defaulted debts or alleged debts of natural persons which arise from transactions which are primarily for personal, family, or household purposes.

11. Defendant, F&M is a collection law firm.

12. Defendant has asserted that Plaintiff incurred or owed a certain financial obligation to Capital One Bank, (USA), N.A. ("Debt" or "Account").

13. The Debt is alleged to arise from one or more transactions.

14. The Debt arose from one or more transactions which were primarily for Plaintiff's personal, family or household purposes.

15. At some point after Plaintiff's alleged default, the original creditor of the Account determined that the debt was uncollectable, and therefore decided to "charge-off" the debt.

16. Sometime after the original creditor charged-off the Account, the creditor of the Account either directly or through intermediate transactions assigned, placed, transferred or sold the Debt to Defendant for collection.

17. The Account was past due and in default at the time it was placed with or assigned to Defendant for collection.

18. At all times relevant hereto, Defendant acted in an attempt to collect the Debt.

B. Threatening Tax Consequences

19. In attempts to collect the Debt, Defendant mailed collection letters to Plaintiff on May 26, 2016 (the "F&M Letter"); true but redacted copy is attached as **Exhibit A**.

20. Plaintiff received and reviewed the F&M Letter.

21. The F&M Letter states that "[the creditor] may be required by law to report this settlement to one or more taxing authorities.

22. Defendant's statements are false, deceptive and misleading.[2]

23. The Department of Treasury regulations require an "applicable entity"[3] to report a discharge of indebtedness over $600 to the Internal Revenue Services if and only if there has been an "identifiable event,"[4] subject to seven exceptions.[5]

24. Such exceptions to the reporting requirement include if the consumer files and obtains a bankruptcy discharge on a consumer debt, or if the discharge is of interest or non-principal amounts.[6]

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[2] *See Good v. Nationwide Credit, Inc.*, 55 F. Supp. 3d 742 (E.D. Pa. 2014).
[3] "Applicable entity" is defined in 26 U.S.C. § 6050P(c)(1).
[4] As described in 26 Treas. Reg. § 1.6050P-1(b)(2).
[5] *See* 26 Treas. Reg. § 1.6050P-1(a)(1), (d).
[6] 26 Treas. Reg. § 1.6050P-1(d)(1)-(3).

25. A portion of the debt allegedly to be due by Plaintiff was interest or non- principal amounts.

26. The statement, "[the creditor] may be required by law to report this settlement to one or more taxing authorities" is false and misleading to Plaintiff, as well as the least sophisticated consumer.

27. The statement misstates the law, fails to disclose that there are exceptions to the filing requirement and fails to state that filing may not be required.

28. Such false statement is deceptive and misleading because the statement conveys to Plaintiff and the least sophisticated consumer that there are consequences to paying or settling the debt for less than what was alleged to be owed.

29. Such false statement is deceptive and misleading because the statement conveys to Plaintiff and the least sophisticated consumer that one may face negative consequences with the Internal Revenue Service for paying or settling the debt for less than what was alleged to be owed.

30. Such false statement is deceptive and misleading because the statement conveys to Plaintiff and the least sophisticated consumer that the creditor of the Account will report to the IRS even when that may not be the case.

31. Such false statement is deceptive and misleading because the statement deliberately fails to disclose to Plaintiff and the least sophisticated consumer that such reporting is required under only limited circumstances.

32. Such false statement is deceptive and misleading because the statement deliberately fails to disclose to Plaintiff and the least sophisticated consumer that such reporting requirement is subject to seven exceptions.

33. There is no law or regulation that requires Defendants to include the tax statement. Defendants' statement invoking the IRS is a collection ploy and a deceptive tactic used to trick Plaintiff and the least sophisticated consumer that paying less than the full amount owed or not paying at all would have serious tax implications or otherwise be in trouble with the IRS.

34. In fact, Defendants deliberately omit that the discharge of indebtedness must be over $600 in principle amounts while invoking the IRS as "a 'collection ploy designed to deceive or mislead' the consumer into thinking that the IRS could be involved in their debt where there is no set of circumstances in which the IRS would be involved."[7]

35. Defendants' statement invoking the IRS is a collection ploy to increase collections by falsely representing the law and threatening tax consequences to Plaintiff and the least sophisticated consumer.

36. "A debt collection letter is deceptive where 'it can be reasonably read to have two or more different meanings, one of which is inaccurate.'"[8]

37. As Plaintiff understood F&M's tax statement, as would the least sophisticated consumer, one would face negative consequences with the IRS for paying or settling the debt for less than what was alleged to be owed.

38. As Plaintiff understood F&M's tax statement, as would the least sophisticated consumer, "she could get in trouble with the IRS for refusal to pay the debt, or for obtaining any debt forgiveness . . . ."[9]

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[7] *Foster v. AllianceOne Receivables Mgmt.*, No. 15-cv-11108, 2016 U.S. Dist. LEXIS 56958, at *5 (N.D. Ill. Apr. 28, 2016)

[8] *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 455 (3d Cir. 2006) (quoting *Wilson v. Quadramed Corp.*, 225 F.3d 350, 354 (3d Cir. 2000)).

[9] *Good*, 55 F. Supp. 3d at 748 (internal quotations marks omitted).

39. As Plaintiff understood F&M's tax statement, as would the least sophisticated consumer, there would be legal consequences with the IRS for leaving any balance owed.

40. As Plaintiff understood F&M's tax statement, as would the least sophisticated consumer, paying less than the full amount owed or not paying at all would have serious tax implications or otherwise be in trouble with the IRS.

41. As Plaintiff understood F&M's tax statement, as would the least sophisticated consumer, "[the creditor] may be required by law to report this settlement to one or more taxing authorities."

42. Upon information and belief, Capital One Bank, (USA), N.A. never filed a form 1099C with the IRS with respect to Plaintiff or the Debt.

43. In fact, the balance of the debt was $1,213.37; therefore, a settlement to pay $700.00 would never forgive more than $600.00 in principle amounts.

44. Defendant's false, deceptive and misleading statement is material to Plaintiff and the least sophisticated consumer because, *inter alia*:

a. the invocation of the IRS, the threatening of tax consequences, and use of the misleading and false statement effects the decision-making of Plaintiff and the least sophisticated consumer;

b. Plaintiff and the least sophisticated consumer are less likely to negotiate the balances down and are more likely succumb to the threat by making substantially higher payments;

c. Plaintiff and the least sophisticated consumer would believe that in order not to be reported to the IRS, one must pay the entire balance regardless of whether the event is reportable or taxable;

d. The statement creates confusion of the legal and tax implication as the alleged indebtedness is not always *taxable* nor always reported to the IRS; and

e. The statement negatively influences someone contemplating for obtaining bankruptcy relief, as Plaintiff and the least sophisticated consumer would believe that one would be faced with negative legal and tax consequences if the debt is wiped out through bankruptcy.

V. COUNT I – FAIR DEBT COLLECTION PRACTICES ACT

45. Plaintiff reasserts and incorporates herein the allegations contained in the preceding and following paragraphs.

46. Plaintiff and those similarly situated are "consumers" as defined by 15 U.S.C. § 1692a(3) because they are natural persons allegedly obligated to pay a debt, in which the money, property, insurance, or services, which was the subject of the transaction, was primarily for personal, family and/or household purposes.

47. The debts alleged to be owed by the Plaintiff and those similarly situated are consumer "debts" as defined by 15 U.S.C. § 1692a(5).

48. Defendant is a "debt collector" as defined by 15 U.S.C. § 1692a(6) and interpretations thereof.

49. The F&M Letter and the same or similar letters sent to New Jersey consumers are "communications" pursuant to 15 U.S.C. § 1692a(2).

50. The F&M Letter and the same or similar letters were sent by Defendant to Plaintiff and those similarly situated in an attempt to collect the debts.

51. By sending numerous collection letters that misleadingly and deceptively invoked the Internal Revenue Service and contained inaccurate statement regarding the tax consequences of a settlement, Defendant violated sections 15 U.S.C. §§ 1692e, 1692e(2)(A), 1692e(4), 1692e(5), 1692e(8), 1692e(10), and 1692f of the FDCPA.

52. The violations of the FDCPA described herein constitute *per se* violations.

53. As a result of any one or more of the above violation of the FDCPA, Defendant is liable to Plaintiff for statutory damages, attorney's fees, and costs.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Camilla A. Toft, on behalf of herself and others similarly situated, demands judgment against Defendant, Fenton & McGarvey Law Firm, P.S.C., as follows:

A. For statutory damages in favor of Plaintiff pursuant to 15 U.S.C. § 1692k(a)(2)(A);

B. For attorney's fees, litigation expenses and costs in connection with this action pursuant to 15 U.S.C. § 1692k(a)(3);

C. For pre-judgment and post-judgment interest; and

D. For such other and further relief as the Court deems equitable and just.

VII. JURY DEMAND

Plaintiff demands trial by jury as to all claims and defenses.

VIII. CERTIFICATION

Pursuant to Local Civil Rule 11.2, I hereby certify to the best of my knowledge that the matter in controversy is not the subject of any other action pending in any court or of any pending arbitration or administrative proceeding.

KIM LAW FIRM LLC

Dated: May 25, 2017

s/ Yongmoon Kim
Yongmoon Kim, Esq.
Attorneys for Plaintiff